# Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v Balakrishnan a/l Kaliannan

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–9–03 OF 2012(C)
RAUS SHARIF PCA, ABDULL HAMID EMBONG, AHMAD MAAROP, HASAN LAH AND ZALEHA ZAHARI FCJJ
15 AUGUST 2013

*Civil Procedure — Interest — Judgment interest — High Court ordered defendant to pay plaintiff balance of purchase price of RM750,000 — Order was silent on interest — Court of Appeal allowed interest at 8%pa from date of filing of writ — Appeal — Whether plaintiff entitled to both pre-judgment and post judgment interest — Whether proceedings before High Court were for recovery of debt or damages — Whether Court of Appeal erred when it allowed pre-judgment interest — Civil Law Act 1956 s 11*

Balakrishnan a/l Kaliannan, the plaintiff/respondent ('the plaintiff'), had entered into an agreement to sell his land situated in Pahang ('the land') to Ritz Garden Hotel Sdn Bhd, the defendant/appellant ('the defendant') for the purchase price of RM1m. Upon the execution of the agreement the defendant paid the plaintiff the sum of RM250,000 by way of deposit and part payment of the purchase price and agreed to pay the balance RM750,000 by way of allotment of 20% shares in the defendant. The defendant failed to pay the full purchase price as agreed but had the land transferred and registered to its name. The plaintiff lodged a private caveat against the land. The plaintiff claimed that the defendant was in breach of fundamental terms and conditions of the agreement by its failure to make full payment of the balance of the purchase price of RM750,000 and the unlawful transfer of the land to its name without paying the said balance. Consequently, the plaintiff commenced a suit against the defendant wherein it prayed, inter alia, for an order that the agreement be terminated by virtue of the defendant's breach; for the sum of RM250,000 received as deposit to be retained to account of general damages; general damages with interest at 8%pa; costs; and further or other relief. In its defence the defendant alleged that the parties had agreed to vary the agreement and that under this oral agreement only RM650,000 was payable to the defendant. The defendant's case was that it was ready, willing and able to pay this varied reduced sum conditional upon the plaintiff withdrawing the private caveat he had lodged against the land. The defendant thus counterclaimed for damages arising from the plaintiff's conduct. After a full trial the High Court judge held that the plaintiff had failed to establish his claim and that the defendant had equally failed to account for the settlement of alleged varied reduced purchase price. In these circumstances the trial judge ruled that the plaintiff was not

entitled to those prayers he had prayed for in his statement of claim. Instead, the trial judge ordered the defendant to pay the plaintiff the remainder of the purchase price of RM750,000 in cash within a reasonable time after the removal of the caveats lodged in respect of the land. However, the order of the High Court was silent on interest on the judgment sum of RM750,000. The plaintiff appealed to the Court of Appeal against this decision. The plaintiff's appeal was confined to the issue of whether he was entitled to interest on the judgment sum of RM750,000, which the defendant was ordered to pay the plaintiff upon the removal of the caveats. The Court of Appeal held that the transfer of the land to the defendant's name without it paying the balance of the purchase price was done in breach of the agreement and thus unlawful. As such, the Court of Appeal held that the plaintiff was justified in lodging the private caveat. With regard to interest, the Court of Appeal exercised its discretionary power under s 11 of the Civil Law Act 1956 ('the Act') and awarded interest at 8%pa from the date of the writ filed by the plaintiff. This was the defendant's appeal against that decision of the Court of Appeal. It was the defendant's submission that since the plaintiff had confined his appeal to the issue of interest on the judgment sum, the Court of Appeal had no jurisdiction to make a finding on the issue as to whether there had been a breach of the agreement. The defendant further contended that since the money was ordered to be paid after the removal of the caveats, the interest could not be ordered to be paid from the date of the writ, which was a date preceding the happening of the event. In response the plaintiff submitted that since he had been deprived of the balance of the purchase price for a period of 20 years, the award of interest was fair and just.

**Held**, allowing the appeal with costs:

(1) There was no merit in the defendant's contention that the proceedings before the High Court was not for the recovery of any debt or damages. On the facts of this case, the sum of RM750,000 that the defendant was ordered to pay to the plaintiff was a debt owed by the defendant to the plaintiff. Further, in his statement of claim the plaintiff had prayed for 'Any other or further relief or order which this Honourable Court deems fit'. This omnibus prayer should not be treated as a mere ornament to pleadings devoid of any meaning. In the circumstances, when the trial judge ordered the defendant to pay the plaintiff the balance purchase price of RM750,000, she would have had in mind the omnibus prayer in the plaintiff's statement of claim. Thus, the money which the trial judge ordered to defendant to pay to the plaintiff was for a debt owed by the defendant to the plaintiff (see paras 21–23).

(2) Under s 11 of the Act the court had the power to order pre-judgment interest. However, based on the order of the trial judge the plaintiff was only lawfully entitled to the money after the caveats on the land were removed and not earlier than that. In other words prior to the removal of

A the caveat he could not say that he had been deprived of the use of the money. As such, the Court of Appeal had erred when it ordered the interest on the judgment sum to be paid from the date of the writ (see para 27).

B (3) (per **Zaleha Zahari FCJ**, dissenting) The argument that the plaintiff was not entitled to both pre-judgment interest and post judgment interest by reason of the defendant's obligation to pay the plaintiff the RM750,000 only upon the withdrawal of the caveats was misconceived. The defendant's obligation to pay the plaintiff the balance of the purchase C price should have been effected within the period specified in the agreement but the defendant had clearly failed to do so. The plaintiff was now constrained by the court order to accept the balance purchase price by way of cash instead of termination after being deprived of the balance of the purchase price for a period of 20 years. In these circumstances, the D Court of Appeal was right in exercising its discretion to award pre-judgment interest from the date of the writ pursuant to s 11 of the Act as well as post judgment interest pursuant to O 42 r 12 of the Rules of the High Court 1980 on the judgment sum. The rate of interest of 8%pa for both periods was also appropriate (see paras 51–53).

E **[Bahasa Malaysia summary**

Balakrishnan a/l Kaliannan, plaintif/responden ('plaintif tersebut'), telah memasuki perjanjian untuk menjual tanahnya yang terletak di Pahang ('tanah tersebut) kepada Ritz Garden Hotel Sdn Bhd, defendan/perayu ('defendan F tersebut') untuk harga belian RM1 juta. Setelah pelaksanaan perjanjian tersebut defendan telah membayar plaintif sejumlah RM250,000 melalui bayaran pendahuluan dan sebahagian bayaran daripada harga belian dan bersetuju untuk membayar baki RM750,000 melalui pengumpukan 20% saham kepada defendan. Defendan telah gagal membayar harga belian G sepenuhnya sebagaimana dipersetujui tetapi telah memindah dan mendaftarkan tanah tersebut atas namanya. Plaintif telah memasukkan kaveat persendirian ke atas tanah tersebut. Plaintif mendakwa bahawa defendan telah melanggar terma dan syarat asas perjanjian tersebut disebabkan kegagalannya membuat bayaran penuh daripada baki harga belian RM750,000 dan H pemindahan tidak sah tanah tersebut atas namanya tanpa membyar baki tersebut. Berikutan itu, plaintif telah memulakan guaman terhadap defendan di mana ia memohon, antara lain, untuk perintah agar perjanjian tersebut ditamatkan berikutan pelanggaran defendan; untuk sejumlah RM250,000 diterima sebagai deposit dipegang untuk membayar ganti rugi am; ganti rugi I am dengan faedah pada 8% setahun; kos; dan relief selanjutnya dan lain. Dalam pembelaannya defendan mengatakan bahawa pihak-pihak telah bersetuju untuk mengubah perjanjian tersebut dan bahawa di bawah perjanjian lisan ini hanya RM650,000 perlu dibayar kepada defendan. Kes defendan adalah ia bersedia, ingin dan mampu membayar jumlah yang diubah

ini dengan syarat plaintif membatalkan kaveat persendirian yang dimasukkannya ke atas tanah tersebut. Defendan oleh itu menuntut balas untuk ganti rugi yang timbul daripada perbuatan plaintif. Selepas perbicaraan penuh hakim Mahkamah Tinggi memutuskan bahawa plaintif telah gagal membuktikan tuntutannya dan bahawa defendan juga telah gagal membuat penyelesaian terhadap pengataan kepada pengurangan harga belian yang diubah itu. Dalam keadaan berikut hakim perbicaraan memutuskan bahawa plaintif tidak berhak kepada permohonan-permohonan yang dipohonnya dalam penyataan tuntutannya. Sebaliknya, hakim perbicaraan memerintahkan defendan membayar plaintif baki harga belian RM750,000 secara tunai dalam tempoh munasabah selepas pembatalan kaveat yang dimasukkan berkaitan tanah tersebut. Walau bagaimanapun, perintah Mahkamah Tinggi tidak menyatakan faedah ke atas jumlah penghakiman RM750,000 itu. Plaintif telah merayu kepada Mahkamah Rayuan terhadap keputusan ini. Rayuan plaintif telah terhad kepada isu sama ada dia berhak kepada faedah ke atas jumlah penghakiman berjumlah RM750,000, yang mana defendan telah diperintahkan untuk membayar plaintif setelah kaveat dibatalkan. Mahkamah Rayuan memutuskan bahawa pemindahan tanah tersebut kepada nama defendan tanpa ia perlu membayar baki harga belian telah dilakukan melanggari perjanjian dan oleh itu menyalahi undang-undang. Oleh itu, Mahkamah Rayuan memutuskan bahawa plaintif wajar memasukkan kaveat persendirian. Berhubung faedah itu, Mahkamah Rayuan telah melaksanakan kuasa budi bicaranya di bawah s 11 Akta Undang-Undang Sivil 1956 ('Akta tersebut') dan mengawardkan faedah pada 8% setahun dari tarikh writ difailkan oleh plaintif. Ini adalah rayuan defendan terhadap keputusan Mahkamah Rayuan. Adalah hujah defendan oleh kerana plaintif menghadkan rayuannya kepada isu faedah atas jumlah penghakiman, Mahkamah Rayuan tiada bidang kuasa untuk membuat penemuan berhubung isu itu tentang sama ada terdapat pelanggaran perjanjian. Defendan selanjutnya berhujah bahawa memandangkan wang itu diperintahkan untuk dibayar selepas pembatalan kaveat tersebut, faedah tidak boleh diperintahkan untuk dibayar dari tarikh writ itu, iaitu tarikh selepas berlaku kejadian itu. Sebagai jawapan plaintif berhujah bahawa memandangkan dia terkilan dengan baki harga belian itu untuk tempoh 20 tahun, award faedah adalah adil dan wajar.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Tiada merit dalam hujah defendan bahawa prosiding di hadapan Mahkamah Tinggi bukan untuk mendapatkan semula apa-apa hutang atau ganti rugi. Berdasarkan fakta kes ini, jumlah RM750,000 yang mana defendan diperintahkan untuk membayar kepada plaintif adalah hutang yang perlu dibayar oleh defendan kepada plaintif. Selanjutnya dalam penyataan tuntutannya plaintif telah memohon untuk 'Any other or further relief or order which this Honourable Court deems fit'. Permohonan ini tidak patut dianggap sebagai permohonan dalam

pliding semata-mata yang tidak mempunyai apa-apa maksud. Dalam keadaan berikut, apabila hakim perbicaraan telah memerintahkan defendan membayar plaintif baki harga belian RM750,000, beliau mungkin memikirkan tentang permohonan dalam penyataan tuntutan plaintif. Oleh itu, wang yang telah diperintahkan oleh hakim perbicaraan untuk dibayar kepada plaintif merupakan hutang yang perlu dibayar oleh defendan kepada plaintif (lihat perenggan 21–23).

(2) Di bawah s 11 Akta mahkamah mempunyai kuasa untuk memerintahkan faedah pra penghakiman. Walau bagaimanapun, berdasarkan perintah hakim perbicaraan plaintif hanya berhak secara sah kepada wang itu selepas kaveat atas tanah tersebut dibatalkan dan bukan lebih awal daripada itu. Dalam erti kata lain sebelum pembatalan kaveat tersebut dia tidak boleh mengatakan bahawa dia terkilan untuk menggunakan wang itu. Oleh itu, Mahkamah Rayuan terkhilaf apabila memerintahkan faedah atas jumlah penghakiman dibayar dari tarikh writ tersebut (lihat perenggan 27).

(3) (oleh **Zaleha Zahari HMP**, menentang) Hujah bahawa plaintif tidak berhak ke atas faedah sebelum penghakiman dan faedah selepas penghakiman oleh sebab kewajipan defendan untuk membayar plaintif RM750,000 hanya selepas pembatalan kaveat tersebut telah disalah tanggap. Kewajipan defendan untuk membayar plaintif baki harga belian patut dilakukan dalam tempoh yang ditetapkan dalam perjanjian tetapi defendan jelas telah gagal untuk berbuat demikian. Plaintif kini dihalang oleh perintah mahkamah untuk menerima baki harga belian secara tunai sebaliknya pembatalan selepas terkilan terhadap baki harga belian untuk tempoh 20 tahun. Dalam keadaan berikut, Mahkamah Rayuan adalah betul dalam melaksanakan budi bicaranya untuk mengawardkan faedah sebelum penghakiman dari tarikh writ itu menurut s 11 Akta tersebut dan juga faedah selepas penghakiman menurut A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ke atas jumlah penghakiman. Kadar faedah 8% setahun untuk kedua-dua tempoh itu juga berpatutan (lihat perenggan 51–53).]

**Notes**

For a case on judgment interest, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 4253.

**Cases referred to**

*Elsinora Global Ltd and Others v Deputy Commissioner of Taxation and Another* [2006] FCAC 156, FC (refd)

*Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd* [1989] 2 MLJ 162, HC (refd)

*Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, FC (refd)

*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, CA (refd)
*Tate and Lyle Food Distribution Ltd v Greater London Council* [1981] 3 All ER 716, QBD (refd)
*Trengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365 (refd)

**Legislation referred to**

Civil Law Act 1956 s 11
Courts of Judicature Act 1964 s 25(1), (2)
National Land Code ss 340, 417
Rules of the High Court 1980 O 42 r 12

**Appeal from:** Civil Appeal No C-02–774 of 2007 (Court of Appeal, Putrajaya)

*Porres Royan (Eric Anthony with him) (Eric and Company) for the appellant.*
*DP Vijandran (R Kengadharan with him) (R Kengadharan & Co) for the respondent.*

**Hasan Lah FCJ:**

INTRODUCTION

**[1]** On 29 February 2012, this court granted leave to the appellant to appeal against the decision of the Court of Appeal given on 2 August 2010.

**[2]** The leave questions allowed are:

(a) is the appellate court entitled to award pre-judgment interest on monies ordered by the trial court to be paid by the defendant to the plaintiff and which monies was neither a debt nor damages sought to be recovered by the plaintiff in the suit? and

(b) where monies are ordered by the trial court to be paid by one party to another only on the happening of an event after judgment, can the appellate court order interest to be paid on the said monies from a date preceding the happening of the event.

**[3]** For convenience, the parties are referred to by their designations as in the High Court. Thus, the appellant herein will be referred to as the defendant and the respondent as the plaintiff.

BACKGROUND FACTS

**[4]** By a written agreement dated 12 December 1991 ('the agreement') the

plaintiff agreed to sell and the defendant agreed to purchase the land identified as QT(R) 9, Lot No LOCH 235/62 Mukim Tanah Rata, Pahang ('the land') for the purchase price of RM1,000,00 of which, a sum of RM250,000 was paid by way of deposit and part-payment on the execution of the agreement. It was also agreed that the balance of the purchase price of RM750,000 was deemed to be paid by the defendant issuing 20% of the total paid up share capital in the defendant ('the said shares'). The land was transferred and registered in the name of the defendant on 14 April 1992. The plaintiff was appointed a director of the defendant sometime in 1992 and he in fact signed a directors' resolution dated 8 December 1992 wherein the defendant was authorised to apply for the conversion of land use from 'residential' to 'commercial' in respect of the land.

**[5]** By letter dated 5 May 1994 the plaintiff's former solicitors informed the defendant that:

> [the Plaintiff] instructs us that he is no longer interested in the total performance of the agreement and therefore considers the agreement terminated with the consequence as follows:
>
> (a) That you do pay our client the balance sum of RM750,000/ in lieu of the shares mentioned above;
>
> OR
>
> (b) That you return the title deed to our client, with no further claims wherein our client forfeits the RM250,000/- as damages.

**[6]** On 19 October 1994, the plaintiff entered a private caveat on the land resulting in the defendant's bankers not disbursing an approved loan. There was also evidence that other caveats had been lodged in respect of the land by a third party namely, Ramasamy and Suppiah s/o AN Periasamy, who claimed to have interest in the land pursuant to agreements with the plaintiff. Ramasamy's caveat was on the basis that the plaintiff had leased the land to him.

HIGH COURT

**[7]** On 6 March 1996 the plaintiff commenced the suit against the defendant and prayed for:

(a) an order that the agreement was terminated by virtue of the defendant's breach;

(b) the sum of RM250,000 received as deposit to be retained to account of general damages;

(c) an order that the registrar of titles to rectify the register by entering the name of the plaintiff as the registered owner;

(d) general damages for breach of the agreement;

(e) interest at 8%pa from date of writ to date of full satisfaction;

(f) costs; and

(g) further or other relief.

**[8]** In its defence, the defendant alleged that the parties had agreed to vary the agreement after taking into account payments made by the defendant to the plaintiff and that the varied agreement required the defendant to pay a further sum of RM650,000 to the plaintiff in lieu of the issue of 750,000 shares in the defendant to the plaintiff.

DECISION OF THE HIGH COURT

**[9]** After a full trial the High Court held that the plaintiff had failed to establish his claim. The learned trial judge however ordered the defendant to pay the plaintiff the remainder of the purchase price that was RM750,000 within a reasonable time after and upon the removal of all the caveats lodged in respect of the land.

THE COURT OF APPEAL

**[10]** The plaintiff appealed to the Court of Appeal against the decision. However, at the hearing before the Court of Appeal the plaintiff confined his appeal on the issue of interest on the judgment sum of RM750,000 that was ordered by the High Court to be paid to the plaintiff. The Court of Appeal allowed the plaintiff's appeal to the extent that it awarded interest at 8%pa from 4 March 1996 (the date of the writ) on the sum of RM750,000.

**[11]** The Court of Appeal held that the transfer of the land to the defendant was done in breach of the agreement and therefore unlawful. Further the Court of Appeal held that the plaintiff, as the aggrieved original owner of the land, was justified in lodging the said private caveat.

**[12]** With regard to interest, the Court of Appeal was of the view that since s 11 of the Civil Law Act 1956 vests discretionary power on the court to award interest in respect of the recovery of debt and damages by a party, the plaintiff should not be deprived of the interest to which he was entitled under the law. In other words, the Court of Appeal exercised its discretion to award interest to the plaintiff.

THE APPEAL

**[13]** Learned counsel for the defendant submitted that the Court of Appeal's

view that 'the transfer of the property in question to the defendant was done in breach of the agreement and, therefore unlawful' was incompatible with the learned trial judge's decision to dismiss the plaintiff's claim. It was the contention of learned counsel for the defendant that as the appeal had been abandoned with respect to the issue of whether there had been a breach of the agreement, the Court of Appeal had no jurisdiction to make such a finding.

**[14]** Learned counsel for the defendant further submitted that the proceedings tried in the High Court was not for the recovery of any debt or damages. The plaintiff's cause of action was for the breach of contract and the remedies sought were for rescission of the agreement, for the deposit of RM250,000 to be forfeited, for the rectification of the land register and for damages. Learned counsel for the defendant therefore contended that interest could not be allowed since s 11 of the Civil Law Act 1956 provided that interest was to be given in any proceeding in any court for the recovery of debt or damages. In support of his submission, learned counsel for the defendant cited the following cases:

(a) *Trengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365;

(b) *Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd* [1989] 2 MLJ 162; and

(c) *Elsinora Global Ltd and Others v Deputy Commissioner of Taxation and Another* [2006] FCACFC 156.

**[15]** It was further contended that since the money was ordered to be paid after the removal of the caveats, the interest could not therefore be ordered to be paid from the date of the writ.

**[16]** In response, learned counsel for the plaintiff submitted that the word 'proceeding' encompasses not only the case as pleaded by the plaintiff but also the counterclaim by the defendant. Since the defendant claimed that the sum of RM650,000 was payable to the defendant, this proceeding comes under the term 'any sum of money which is recoverable from another'. This was therefore a proceeding within the definition of s 11 of the Civil Law Act 1956 and interest can be awarded.

**[17]** Learned counsel for the plaintiff also submitted that the words 'any debt or damages' in s 11 of the Civil Law Act 1956 should be construed to cover any sum of money which was recoverable by one party from another and that the courts had wide power to award interest under that section. In support of that he also referred to *Guna Sittampalam*.

**[18]** It was further submitted that on the facts of the instant case the award of interest to the plaintiff was fair and just. The defendant had full use of the land and its appreciated value but only fully paid up the balance of the purchase price in the year 2011. The plaintiff had been kept out of the balance of the purchase price for a period of 20 years.

**[19]** Lastly it was submitted that the term 'proceeding' in s 11 of the Civil Law Act 1956 should not be narrowly interpreted. The term must be defined to include the whole gamut from pleadings to judgment. The judgment finally determined what the nature of the proceeding was regardless of what labels or categories the parties put up. The relief or remedy that a judge orders may be different from what the parties asked but that remedy is what defines the proceeding.

**[20]** In her judgment the learned trial judge ordered the defendant to pay the remainder of the purchase price that was RM750,000 within a reasonable time after and upon a removal of all the caveats lodged in respect of the land. In my view, on the facts of this case, the sum of RM750,000 was a debt owed by the defendant to the plaintiff in the form of the balance purchase price of the land.

**[21]** With respect I am unable to agree with the contention by the defendant that the proceedings tried in the High Court was not for the recovery of any debt or damages, as the remedies sought by the plaintiff were for rescission of the agreement, for the deposit of RM250,000 to be forfeited, for rectification of the land register and for damages. It is to be noted that in prayer (G) of his statement of claim the plaintiff prayed for 'Lain-lain dan/atau apa-apa relif dan/atau perintah berlainan atau berlanjutan yang Mahkamah Yang Mulia ini fikirkan suai dan manfaat' (Any other or further relief or order which this Honourable court deems fit)'. This omnibus prayer must not be treated as a mere ornament to pleadings devoid of any meaning (see *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 Gopal Sri Ram JCA at p 301 said:

> In his statement of claim, the appellant has also prayed for 'further or other relief as this Honourable court thinks fit'. In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156 at p 160, a prayer in a statement of claim read 'Any other relief which this Honourable court deems fit to grant'. Salleh Abas FJ (as he then was) said that this prayer 'must not be treated as a mere ornament to pleadings devoid of any meaning'.
>
> I am of the view that the same may be said of the like prayer in the present case. This court should, in my judgment, award the appellant such relief as is appropriate in the circumstances of the case.

**[22]** In my view, when the learned trial judge ordered the defendant to pay the plaintiff the balance purchase price of RM750,000 she had in her mind this

omnibus prayer in the plaintiff's statement of claim. She was entitled to do so on the facts of this case as the land had been transferred to the defendant. In *Guna Sittampalam* Gunn Chit Tuan J at pp 169–170 had this to say:

> The House of Lords has held that the words 'any debt or damages' in s 3(1) of the UK Law Reform (Miscellaneous Provisions) Act 1934 'are very wide, so that they cover any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute' (such as the UK Law Reform (Frustrated Contracts) Act 1943 in that case: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)*). As s 11 of our Civil Law Act 1956 is in pari material with the said s 3(1) of the UK Law Reform (Miscellaneous Provisions) Act 1934, the words 'any debt or damages' in s 11 of the Civil Law Act 1956 should also be construed to cover any sum of money which is recoverable by one party from another.

**[23]** I am of the view that since I find that the money ordered to be paid by the learned trial judge by the defendant to the plaintiff was for a debt owed by the defendant to the plaintiff, it is not necessary to answer the first question of law posed in this appeal.

**[24]** With regard to the second question of law posed I take note that the order of the learned trial judge was that the money to be paid within a reasonable time after and upon removal of all the caveats lodged in respect of the land. When the judgment was delivered by the learned trial judge the caveats had not been removed yet. In the Court of Appeal the plaintiff did not appeal against the order. The Court of Appeal also did not vary the order. The order therefore stands and binds the parties.

**[25]** The power of the courts to award pre-judgment interest is provided under s 11 of the Civil Law Act 1956 which reads as follow:

> In any proceedings tried in any court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

**[26]** It is trite law that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use. Salleh Abas FJ (as he then was) sitting as a puisne judge in *Trengganu State Economic Development Corporation v Nadefinco Ltd* at p 368 opined:

> Interest is a sum of money representing the return for the use of the compensation for the retention by one person of a sum of money belonging to or owed to another. In essence it is regarded as representing a profit which the other person might have made if he had the use of the money or conversely the loss which he had suffered because he had not that use. In other words interest is a compensation for the

deprivation of the use of money, which he is lawfully entitled to (per *Lord Wright in Riches v Westminister Bank Ltd*). As a result of almost two centuries of development by the common law courts and the courts of equity and also by Acts of Parliament it has now become a settled principle that interest is only payable, where there is an agreement express or implied or where the principal money has been wrongfully withheld or where there is a statute authorising the charging of interest, (per Collin MR in *Borthwick v Elderslie SS* 27 *Halsbury's Laws of England* (3rd Ed), p 8 and per Lord Herschell LC in *LCD Rly v SE Rly* quoting with approval the judgment of Lord Tenterden in *Page v Newman*).

**[27]** Based on the order of the learned trial judge the plaintiff was only lawfully entitled to the money after the caveats on the land were removed and not earlier than that. In other words prior to the removal of the caveat he could not say that he had been deprived of the use of the money. As such, with respect, I am of the view that the Court of Appeal has erred when it ordered the interest on the judgment sum to be paid from the date of the writ.

**[28]** For the reason given my answer to the second question posed in this appeal is in the negative.

CONCLUSION

**[29]** Accordingly the appeal is allowed with costs. The orders of the Court of Appeal are therefore set aside. The learned President of the Court of Appeal and my learned brothers Abdull Hamid Embong and Ahmad Hj Maarop FCJJ have read this judgment in draft and have expressed their agreement with it.

**Zaleha Zahari FCJ:**

**[30]** The defendant (the appellant in this appeal) is seeking for a reversal of the Court of Appeal order dated 2 August 2010. The issue for determination in this appeal is whether, on the facts and circumstances of this case, the Court of Appeal was right in exercising its discretion in awarding the plaintiff (the respondent in this appeal) interest at the rate of 8%pa from the date of filing of the summons on the sum which the High Court judge had directed the defendant to pay the plaintiff upon the removal of the private caveats that had been lodged against land known as QT(R) 9 Lot No LOC H 235/62 Mukim Tanah Rata, Cameron Highlands ('the said land').

**[31]** The claim and counterclaim in this case arose out of a sale and purchase agreement dated 12 December 1991 between the plaintiff (who was then the registered owner of the said land), as vendor, and the defendant, as purchaser,

(subsequently referred to as 'the said agreement') at a purchase price of RM1,000,000. It is common ground that the defendant had paid the plaintiff RM250,000 as deposit.

**[32]** Before dealing with the rival arguments on the issue in this appeal it is necessary to make reference to certain clauses in the said agreement. Clause 3(i) of the said agreement provides that the defendant was required to obtain the requisite approval for the development of the said land into a hotel and/or cum condominium within a period of two years from 12 December 1991. The defendant was required to commence construction within two years from the date of the said agreement, and the development was to be completed within three years from the date of its commencement.

**[33]** The following facts have been proved or were not in issue. The said land was registered in the defendant's name about four months after the said agreement was executed, ie on 14 April 1992. Five months later, on 19 October 1994, the plaintiff lodged a private caveat against the said land. The title shows the lodgment by the plaintiff of another private caveat against the said land on 17 October 2000; subsequently, on 21 November 2000, Suppiah s/o Periasamy had also lodged a private caveat against the said land.

**[34]** The plaintiff alleged that the defendant was in breach of fundamental terms and conditions of the said agreement: (a) failed to make full payment of the balance consideration of RM750,000 to him in the form of shares constituting 20% of the defendant's paid up capital; (b) failed to obtain the necessary approvals from the relevant authorities to develop the said land on or before 12 December 1993; (c) unlawfully caused the Pahang Registrar of Titles to register the transfer of the said land in the defendant's name although the full purchase price had not been paid to the plaintiff.

**[35]** On 6 March 1996 the plaintiff filed an action against the defendant and another, which was subsequently amended on 25 February 2002 by the deletion of the named second defendant as a party to the action. By the amended writ and amended statement of claim, the plaintiff prayed for the following orders against the defendant (a) the agreement dated 12 December 1991 be terminated; (b) the deposit of RM250,000 paid by the defendant be retained by the plaintiff towards damages; (c) an order pursuant to s 417 of the National Land Code (subsequently referred to as 'the Code') instructing the Pahang Registrar of Titles to rectify the register and the plaintiff be restored as the registered owner of the said land; (d) general damages for breach the said agreement; (e) interest at the rate of 8% from the date of filing of the summons to date of full settlement; (f) costs.

**[36]** In its statement of defence and counterclaim the defendant denied that

the said land had been registered into its name by way of fraud. On the non-compliance of the terms of payment of the balance purchase price of RM750,000 by way of allotment of 20% shares in the defendant, the defendant's case was that there was an oral agreement for the defendant to pay a reduced price, and that only RM650,000 was payable to the plaintiff. The defendant's case was that it was at all times ready, able and willing to pay this varied reduced sum conditional upon the plaintiff withdrawing the private caveat that he had lodged against the said land, which the plaintiff had failed to do. The defendant then alleged that it had suffered damages arising from the plaintiff's conduct entitling them to damages as pleaded in the counterclaim.

**[37]** The case proceeded to trial. On the totality of the evidence before her the learned trial judge's finding was that the plaintiff had failed to prove fraud or lack of consent in having the said land registered in the defendant's name. The learned High Court judge was of the view that it was untenable for the plaintiff to pray for the instrument of title to be registered in his name and yet deny the defendant the right to rely on s 340 of the Code. The trial judge's further finding was that the defendant had equally failed to account for the settlement of the alleged varied reduced price.

**[38]** As to where the balance of justice lies based on these findings of fact, taking into consideration the fact that the said land had already been registered in the defendant's name, and the fact that the balance purchase price had not been settled, the High Court judge ruled that the plaintiff was 'not entitled to the prayers prayed for in his Statement of Claim'. The learned trial judge was of the view that the most appropriate relief to issue based on these findings of facts was not that prayed for by the plaintiff. She instead directed the defendant to settle the remainder of the purchase price of RM750,000 in cash in lieu of that provided in cl 3(i) within a reasonable time after and upon the removal of all private caveats that had been lodged against the said land. Each party was then directed to bear their own costs.

**[39]** The order issued by the High Court was silent on interest on this judgment sum of RM750,000 although there was an express prayer by the plaintiff for interest. The High Court judge also did not address this issue in her judgment, why she considered it inappropriate to exercise the discretionary power conferred on the courts by the law and the rules (which will be dealt with subsequently in this judgment) to award interest on the sum which the defendant was directed to pay the plaintiff.

**[40]** The plaintiff appealed against the whole of the decision of the High Court to the Court of Appeal. The memorandum of appeal lodged raised several grounds, but at the hearing, proceeded only on one issue, ie whether the

plaintiff was entitled to interest on the sum which the defendant was ordered to pay to the plaintiff upon the removal of private caveats lodged against the said land.

**[41]** The Court of Appeal ruled in favour of the plaintiff on this particular issue. The Court of Appeal allowed the plaintiff's appeal and awarded the plaintiff interest at 8% from the date of filing of the writ on the sum which the defendant was ordered to pay to the plaintiff. The Court of Appeal's reasoning as to why the discretionary power conferred by the courts to award interest should be exercised in the plaintiff's favour were as follows:

> … on the factual matrix of the evidence before the court it is apparent that the crux of the agreement between the parties was for them to embark on a joint-venture to develop the plaintiff's land into hotel cum condominium with terms and condition as earlier mentioned. Clearly, from the evidence as found by the learned trial judge the defendant had not fulfilled conditions (c), (d) and (e) above. Notwithstanding that the defendant had proceeded to have the property in question transferred and registered in its name. Although it is the contention of the defendant that there was an oral agreement by the parties subsequently to vary the joint-venture agreement in particular a reduction in the sale and purchase price, the learned trial judge in her decision had found that the defendant had failed to prove that such oral agreement took place. Hence, the order that 'the defendant do pay the plaintiff the remainder of the purchase price that is RM750,000 …
>
> Since the learned trial judge had rejected the defendant's claim that there was an oral agreement to vary the terms and conditions of the JV agreement it must necessarily follow that the transfer of the land by the defendant to itself can only be done after all terms and conditions as stipulated in the agreement had been fulfilled. Clearly, from the evidence the defendant had failed to keep its side of the bargain. In the circumstances, we are of the view that the transfer of the property in question to the defendant was done in breach of the agreement and, therefore, unlawful. Perusal of the appeal record shows that the lodgment of the private caveat by the plaintiff was made after the transfer of the property by the defendant. In these circumstances, the plaintiff as the aggrieved original owner of the land is justified in lodging the said private caveat. In short, the plaintiff is not at fault. Further, we are mindful of the fact that interest is very much a discretionary matter. The discretion has to be exercised judiciously. In the circumstances of this case we do not see any justification for the plaintiff to be deprived of the interest to which he is entitled under the law as aforesaid. By reason of these, we allowed the appeal with no order as to costs.

DECISION

**[42]** Pre-judgment and post-judgment interest is an important part of the total award as the litigation process for any given case can take years to complete. In this particular case, the litigation process from date of filing (6 March 1996) to date of judgment of the High Court (3 August 2007) has taken a period of more than ten years.

**[43]** Different rules and rationale are applicable for the imposition of interest in respect of the pre-judgment period (when the cause of action arose and the date of judgment) and that for the post judgment period (the date of judgment to the date of actual payment).

*Pre-judgment period*

**[44]** In respect of pre-judgment interest courts derive their jurisdiction to grant such interest under s 11 of the Civil Law Act 1956 which provides as follows:

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

**[45]** The words '… the court may if it thinks fit' clearly confers upon a court an unfettered discretion to award interest, whether from the date the cause of action arose, or from the date the action was filed. Although a successful plaintiff is prima facie entitled to pre-judgment interest, the court must necessarily also take into consideration other factors such as the nature of the claim, whether the plaintiff was guilty of delay, the conduct of parties as well as the reasonableness of the defence put up. These factors are all relevant in determining the extent of interest to be awarded for the pre-judgment period. The extent of compensation expressed in terms of the rate of interest and the length of the pre-judgment period for which the interest is awarded must necessarily differ according to the facts and circumstances of each case. The reasonable rate in any particular case must necessarily take into consideration the return/income the plaintiff would have enjoyed if the agreed consideration had been complied with within the stipulated period. The court looks not at the profit which the defendant has wrongly made out of the money withheld, but rather at the costs to the plaintiff of being deprived of the money which he would have had (see *Tate and Lyle Food Distribution Ltd v Greater London Council* [1981] 3 All ER 716 at p 722).

*Post judgment period*

**[46]** As for interest for the post judgment period, s 25(2) of the Courts of

Judicature Act 1964 and para 7 of the Schedule to the Act applies. Section 25(2) of this Act states 'Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same'. Paragraph 7 of the Schedule to the Act then confers upon the courts the 'Power to direct interest to be paid on debts including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court'.

**[47]** Order 42 r 12 of the Rules of the High Court 1980 ('the Rules') prescribes the interest awardable for the post-judgment period in the following terms:

> Every judgment debt shall carry interest at the rate of 8 per cent per annum or at such rate not exceeding the rate aforesaid as the court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

**[48]** Thus, if the words in O 42 r 12 were to be given their ordinary meaning, a successful plaintiff is entitled to post judgment interest in respect of monetary awards. The rationale in awarding a plaintiff post-judgment interest is because the plaintiff has been kept out of his money by the defendant. Levying it also serves as an incentive for prompt payment on the judgment entered.

**[49]** In making a considered decision in this appeal I am of the view it is important to first of all set the order made by the High Court judge in its proper perspective. Did the High Court judge dismiss the plaintiff's claim? I say 'No' for the following reasons. The High Court order dated 3 August 2007 did not state so. Her decision in directing the defendant to make the balance payment in cash in lieu of that specified in the agreement was clearly grounded on her finding of fact that the defendant had defaulted in complying with cl 3(i) of the said agreement. The defendant had failed to issue the agreed 20% shares of the defendant to the plaintiff. In other words, the balance purchase price of RM750,000 remained unpaid until the end of trial. The judge's further finding was that the defendant had failed to prove their defence of the existence of an oral agreement to reduce the purchase price to only RM650,000. The reason for non-payment by reason of the existence of an alleged oral agreement to pay a varied reduced price had accordingly been found to be untrue, and been rejected by the High Court judge. Thus, the proved fact was, despite having only paid 20% of the purchase price, the defendant had some five months after execution of the said agreement caused to have the said land registered into its name.

**[50]** The appropriate relief the plaintiff was entitled to arising from the defendant's default, according to the judge, was not any of those that had been prayed for by him. In lieu of the agreed terms of payment of the balance purchase price, the learned judge directed the defendant to settle the balance of the purchase price in terms of cash.

**[51]** I am of the considered opinion the argument that the plaintiff is not entitled to both pre-judgment interest and post judgment interest by reason of the defendant's obligation to pay the plaintiff the RM750,000 only upon the withdrawal of all caveats is misconceived. The defendant's obligation to pay the plaintiff the balance purchase price should have been effected within the period specified in the agreement. The defendant had clearly failed to do.

**[52]** In a joint venture case such as this, the plaintiff clearly has been denied the shares representing 20% of the defendant. The plaintiff has lost the profits which he hopes the defendant company would gain from the joint venture undertaken. Despite having proved a breach of the payment clause, the plaintiff is now constrained by the court order to accept the balance purchase price by way of cash instead of termination. The defendant is paying the balance sum in monetary terms for a piece of land at a 1991 price, which land would certainly have appreciated in value over the past 20 years. Had the balance purchase price been paid by the defendant in cash way back then, that money would certainly have produced an addition to the plaintiff's general funds by way of interest earned, which addition would itself have been available to earn interest.

**[53]** I am of the view that the Court of Appeal was therefore in these circumstances, right in exercising their discretion to award pre-judgment interest from date of writ pursuant to s 11 of the Civil Law Act 1956, as well as post judgment interest pursuant to O 42 r 12 of the Rules on the judgment sum of RM750,000 which the defendant was directed to pay to the plaintiff. The rate of interest of 8%pa for both periods in my view is appropriate.

**[54]** I would accordingly answer the first question of law in this appeal in the affirmative and that it is not necessary to answer the second question of law posed.

**[55]** On my part, for the reasons set out above, the decision of the Court of Appeal is affirmed and this appeal is accordingly dismissed with costs.

*Appeal allowed with costs.*

Reported by Kohila Nesan